No. 76-317

In the Supreme Court of the United States

OCTOBER TERM, 1976

O-J TRANSPORT COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A25-A36) is reported at 536 F. 2d 126. The report and order of the Interstate Commerce Commission (Pet. App. A8-A22) are reported at 120 M.C.C. 699. The final order of the Commission (Pet. App. A23-A24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1976. The petition for a writ of certiorari was filed on September 1, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 206(a)(1) and 207(a) of the Interstate Commerce Act, as added, 49 Stat. 551-552, and amended, 49 U.S.C. 306(a)(1) and 307(a), and the Statement of the National Transportation Policy, 49 U.S.C. preceding 301, are set forth in Appendix E to the petition (Pet. App. A37-A39).

QUESTION PRESENTED

Whether in making a public convenience and necessity determination the Interstate Commerce Commission is required to consider the minority racial status of the owners of the applicant company absent some showing that racial status will affect the transportation needs of the public.

STATEMENT

This petition arises out of a "public convenience and necessity" determination pursuant to Section 207(a), 49 U.S.C. 307(a), with respect to a motor common carrier license. In April 1973, two black entrepreneurs seeking to do business as O-J Transport Company applied to the Interstate Commerce Commission for authority to transport: (A) automobile parts between, on the one hand, four Michigan counties adjacent to Detroit, Michigan, and, on the other, Chicago, Illinois, and Janesville, Kenosha, and Milwaukee, Wisconsin; and (B) malt beverages between Milwaukee and Detroit (Pet. App. A1-A2). Hearings were held and an administrative law judge recommended that the Commission grant substantially all of the authority requested (Pet. App. A1-A7).

On exceptions, the Commission's Division 1 agreed that the malt beverages authority should be granted[1] but

[1]This aspect of the Commission's decision was not challenged before the court of appeals and is not at issue here.

denied petitioner's application insofar as it sought authority to transport auto parts. In making its public convenience and necessity determination regarding the need for an additional carrier authorized to transport auto parts, the Commission refused to consider evidence of petitioner's ownership by members of a particular minority group (Pet. App. A13-A14). On the basis of the remaining evidence, the Commission found that petitioner had failed to demonstrate a specialized or general public need for its proposed auto parts service, that the thirteen protesting carriers were capable of satisfying the area's auto parts transportation requirements for the present and reasonably foreseeable future, and that existing carriers were suffering from an imbalance of traffic in the Detroit area and needed additional traffic out-bound from Detroit to balance their operations (Pet. App. A13-A15).[2]

On petition for review, the court of appeals rejected petitioner's arguments relating to the adequacy of the Commission's findings and the substantiality of the evidence and affirmed the Commission's decision that evidence of petitioner's minority ownership was not a proper consideration in resolving the license application in this case (Pet. App. A25-A36).

ARGUMENT

The only issue of arguable significance raised by the petition[3] is whether the Commission is required to consider the minority racial status of an applicant company's

[2]Commissioner O'Neal dissented from the decision by Commissioners Murphy and Gresham as to the need for the proposed service but agreed that the issue of minority group status had no bearing on the license application in this case (Pet. App. A16-A18).

[3]Petitioner's arguments relating to the adequacy of the Commission's findings and the substantiality of the evidence were properly rejected by the court of appeals (Pet. App. A27-A31). With particular

owners in the absence of any showing that racial status will affect public transportation needs. Petitioner argues that the public convenience and necessity standard requires Commission cognizance of minority ownership so that the Commission may "provide them [the minority group] with redress from an earlier opportunity from which they were excluded * * *" (Pet. 18).[4] The theory that public interest mandates in regulatory statutes provide a directive to eradicate racial discrimination was recently rejected by this Court in *NAACP* v. *Federal Power Commission*, No. 74-1608, decided May 19, 1976. In that case petitioners argued that the Federal Power Commission erred in refusing to adopt a broad rule "requiring equal employment opportunity and nondiscrimination in in the employment practices of its regulatees." Slip op. 1. This Court held that the Commission is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees

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reference to this Court's decision in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293, the court of appeals held that the Commission's findings reflect "a weighing of competing interests and a determination that the adverse effect upon existing carriers of granting the application would outweigh any benefit to the public disclosed by the applicant's evidence" (Pet. App. A30-A31). Petitioner's challenge to these findings does not warrant plenary consideration in view of the exhaustive treatment of the same subjects by this Court in *Bowman, supra*. Cf. *Ralston Purina Co.* v. *Louisville & N.R. Co.*, No. 75-1015, decided June 14, 1976.

[4]Petitioner does not suggest that the Commission discriminates against minority-owned applicants in administering the certificate provisions of the Interstate Commerce Act. Instead, petitioner apparently contends (Pet. 15) that, because "grandfather" certificates were issued to existing carriers at a time when black business ownership was rare, the present colorblind administration of the Act limits participation by minorities in the trucking industry. Even assuming this to be true, the remedy lies with Congress rather than the Commission.

insofar as such consequences are directly related to the establishment of just and reasonable rates, but that the use of the words "public interest" in the Natural Gas and Federal Power Acts does not give the Commission authority to seek to eradicate employment discrimination. The Court further held that "use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare." Slip op. 7.

The court of appeals in the instant case correctly concluded that the rationale of *NAACP* v. *Federal Power Commission* is equally applicable to the public convenience and necessity determinations of the Interstate Commerce Commission. The ICC is charged with the enforcement of legislation that relates specifically to transportation facilities, problems and services, and the policies expressed in that legislation "must be the basic determinants of its action." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 80. As the court below concluded, the public interest the Commission is charged with furthering relates to "systems of transportation which are safe, adequate, economical and efficient" (Pet. App. A34). See *NAACP* v. *Federal Power Commission, supra*, slip op. 7; *New York Central Securities Corporation* v. *United States*, 287 U.S. 12, 24-25; *McLean Trucking Co.* v. *United States, supra*, 321 U.S. at 79.

Evidence of ownership by a particular ethnic group may warrant consideration when such evidence is directly related to the public's transportation needs (Pet. App. A36). See *National Bus Traffic Association, Inc.* v. *United States*, 284 F. Supp. 270 (N.D. Ill.), affirmed *per curiam*, 391 U.S. 468; *Elegante Tours, Inc.—Broker Application*, 113

M.C.C. 156, 160.[5] While affirming the Commission's decision excluding considerations of race in this case, the court of appeals made clear that in a proper case racial or ethnic ownership may "play a role in the determination of whether to grant authority * * *" (Pet. App. A36). However, there was no showing by petitioner here that the entry of a carrier owned by members of a particular minority group into the auto parts hauling business in the particular area covered by petitioner's application would better serve the transportation needs of the public. As the court of appeals determined: "we find it [racial status] was not a proper consideration in the present case because it was totally unrelated to the transportation needs of the public" (Pet. App. A36).

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[5]Although on the Commission level this point may have been obscured somewhat by the broad language used by the majority of Division 1 (Pet. App. A36), the entire Commission (one Commissioner not participating) recently reasserted its authority to consider racial or ethnic factors where related to transportation needs. *Shippers Truck Service, Inc. Extension—19 States*, 125 M.C.C. 323.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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